U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

February 28, 2017

BY ECF

The Honorable Vernon S. Broderick
United States District Judge
Thurgood Marshall United States Courthouse, Room 415
40 Foley Square
New York, New York 10007

Re: ***United States* v. *Ng Lap Seng and Jeff C. Yin,***
S5 15 Cr. 706 (VSB)

Dear Judge Broderick:

The Government respectfully submits this letter pursuant to the Court's direction in the above-captioned matter that the parties provide "a joint status update letter regarding agreements reached or disputes concerning stipulations as to document custodians." (Docket Entry No. 391.) To date, no agreements have been reached between the parties regarding stipulations. The present status of the parties' discussions, as well as the Government's and the defense's respective positions, are set forth below.

Status of Discussions

As set forth in more detail below, this past Friday, February 24, 2017, the Government sent counsel for both defendants a list of categories of materials for which the Government expects to seek stipulations as to authenticity. Both defense teams have since indicated that they are open to certain (but not all) stipulations, but cannot agree to stipulate to any of the categories of materials without first reviewing both the documents the Government is planning to introduce by stipulation and the text of the stipulations themselves. While the Government intends to identify the documents associated with relevant custodians and to provide proposed stipulations to the defendants reasonably in advance of trial, the Government cannot do so presently, more than 10 weeks before trial, as the Government is currently focusing on other aspects of its ongoing investigation, trial preparation, and pending and expected litigation in this matter.

The categories of materials for which the Government stated that it expects to seek stipulations as to authenticity are as follows:[1,2]

1. Email records (*e.g.*, Google and Yahoo);

2. Bank records (*e.g.*, JPMorgan Chase and Bank of America);

3. Phone records (*e.g.*, Verizon);

4. Documents produced by the United Nations ("UN");

5. Documents accessible from UN and United Nations Development Programme websites (*e.g.*, http://ssc.undp.org/content/ssc/strategyforum.html);

6. Postings on Twitter;

7. Federal government records (*e.g.*, tax records obtained from the Internal Revenue Service, and travel records obtained from the Department of Homeland Security);

8. NGO-1 books and records (obtained by subpoena);

9. Video, transcript, and translation of post-arrest interviews (to the extent admissible pending resolution of suppression motions and while reserving the right to challenge particular translations/transcripts, if the parties cannot agree on them);

10. Translations of Chinese-language documents (while reserving the right to challenge particular translations, if the parties cannot agree on them);

11. Materials seized in connection with arrests and the execution of search warrants in this case (*i.e.*, stipulating that such materials were seized from a particular location/person on a particular date);

12. Extractions of electronic devices (*i.e.*, stipulating that particular exhibits were extracted from particular devices); and

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[1] Although the Government did not identify the specific sets of documents from the particular custodians or other sources of materials at issue, records from the pertinent third-parties are readily identifiable in the Government's discovery index.

[2] The Government stated that it was not seeking any agreement, at this time, to stipulate to the relevance or admissibility of these categories of materials. The Government also asked the defendants to identify any materials for which they expect to seek a stipulation as to authenticity. The defendants did not respond to that request.

13. Photographs taken in connection with this investigation (*i.e.*, stipulating that particular photos were taken at particular dates/times/locations).

The Government's Position

The responses by the defense to the Government's February 24, 2017 inquiry included multiple caveats and limitations, which are not fully set forth in the section of this letter authored by the defense, and included Ng's counsel expressing a preference that stipulations name and rest solely on what the individual who personally previously produced the documents to the Government would say if called to testify.[3] These caveats and limitations, if maintained, would (1) significantly increase the amount of work required to prepare and reach agreement on stipulations, (2) make agreement difficult or impossible for several categories of materials,[4] and (3) decrease the likelihood that the scope of an agreement would be sufficient to moot the need for a witness to testify. In addition, the defense has indicated that it is unlikely to agree to all proposed stipulations.[5] To ensure a full and fair presentation of relevant evidence at trial, the Government accordingly intends to move to identify, subpoena as necessary, and prepare to call a number of custodians, which will require meaningful resources that could otherwise be allocated to other pretrial tasks, such as the preparation of exhibits and 3500 material.

While the defense has stated that it is open to reviewing stipulations in the hope that agreement may be reached, and the Government also hopes that agreement may be reached, the nature of the defense responses suggests to the Government that agreement, if any, will be difficult to reach, may be limited in scope, and in any event will not be reached until such time as the Government both identifies its exhibits with precision and drafts stipulations that are tied to those precise exhibits. The Government cannot do so at this time, more than 10 weeks before trial. All counsel in this matter are highly experienced and familiar with the standard language used in records stipulations in this district, and can identify in the discovery index the documents that were provided by various email, phone, bank and other third-party custodians. The Government submits that the defense hesitation to committing firmly to not contest the authenticity of a document that was provided by a known third-party, such as Google, and instead to require that the Government identify its exhibits and draft stipulations at this stage, is, at bottom, an attempt to get early exhibits and/or distract the Government from other pretrial tasks with work that, given the tenor and substance of responses, the Government believes, unfortunately, may be fruitless.

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[3] There is no legal authority for such an approach. *See* Fed R. Evid. 803(6)(d) (admissibility may be "shown by the testimony of the custodian *or* another qualified witness" (emphasis added)); *United States* v. *Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (the witness "need not have personal knowledge of the actual creation of the document"); *see also*, *e.g.*, *United States* v. *Komasa*, 767 F.3d 151, 156 (2d Cir. 2014); *Parker* v. *Reda*, 327 F.3d 211, 214-15 (2d Cir. 2003); *Phoenix Associates III* v. *Stone*, 60 F.3d 95, 101 (2d Cir. 1995).

[4] Because not all third-parties identify the individual providing documents at the time they are provided, and because that individual, even if identified, may no longer work for the third-party or be available to testify, complying with the Ng's stated preference would, as a practical matter, require the Government to take the same steps it would have to take were there no agreement.

[5] While the defense need not provide the bases for so declining, to the extent that bases have been provided, the Government does not believe them to be meritorious. With respect to NGO-1, for example, while the Government intends to call at least one witness from NGO-1, in the event that that individual is not in a position to authenticate all pertinent documents from NGO-1, a stipulation would remain necessary. And even if the individual were able to authenticate all pertinent documents, a stipulation as to authenticity generally streamlines the presentation of evidence.

The Government respectfully requests that the Court take the foregoing facts into account in setting remaining pretrial deadlines, and maintains that its proposal for pretrial disclosure deadlines, as described in its letter of February 22, 2017 (Docket Entry No. 394), is appropriate. As set forth in that letter, the Government is amenable to earlier than standard production of 3500 material if the parties are able to reach agreement on stipulations.

The Defendants' Position

The defendants' request for pre-trial disclosure deadlines are fully set forth in Mr. Ng's letters dated February 15 and 27, 2017 (Docket Entry Nos. 388 and 398).

As we informed the Government, the defense is open to stipulations and is ready to discuss draft stipulation language for specific documents. We have asked for such drafts and the Government has declined to provide them at this time. If the Government knows what documents it would like to introduce by stipulation, it should share that with the defense, and we can work to come to an agreement expeditiously. In the abstract, however, the defense cannot agree to stipulate to the authenticity of broad categories of documents that have not been identified.

It is unfair for the Government to imply that, if we do not agree to their proposed stipulation categories now, that it will delay the production of 3500 material and other pre-trial documents. Even if no stipulations are agreed to, there is little burden on the Government in simply calling counsel for each of the entities affected to let them know custodians must be available to get documents into evidence. On the other hand, for the reasons explained in Mr. Ng's letters, additional delay in the Government's production of 3500 material and exhibits will severely prejudice the defendants' ability to prepare for trial.

But, again, we remain ready to discuss all the stipulations once we have draft language to review. As for the reference to Ng's counsel's preference for testimonial stipulations, as we made clear to the Government, if this proves unduly burdensome for the Government, we were ready to consider custodial stipulations.

With respect to the categories of stipulations the Government has requested, based on the information the Government has currently provided, the defense would likely agree to custodial stipulations for emails, bank records, phone records, documents produced from the UN and documents available on UN websites, and government records (categories 1-5 & 7, above).

Records from NGO-1 (category 8): The defense understood that the Government intended to call NGO-1 witnesses, so is not clear to the defense what stipulations would be needed with respect to these documents.

Photos, extraction of electronic data from specific devices, items seized pursuant to a search warrant (categories 11-13): This is an exceedingly broad category. We would need more information about what the Government plans to introduce by stipulation and what the stipulations would say.

Translations of Chinese documents (category 10): We will work with the Government to attempt to reach an agreement on translations.

Videos, transcripts, translations of interrogation (category 9): Because this category of information is currently under dispute in suppression motions, this request is premature.

The sooner the Government lets the defense know what specifically it intends to offer through a stipulation, the sooner the defense can identity and resolve any disagreements.

Respectfully submitted,

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